
IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-09-0601

PHYLLIS JAMISON,

Plaintiff and Appellant,

v.

FRED VAN VALKENBURG, MISSOULA COUNTY COMMISSION,
BILL CAREY, COMMISSIONER, JEAN CURTISS, COMMISSIONER,
JAMES MCCUBBIN, DEPUTY COUNTY ATTORNEY, DENA L. LUND,
JACK S. LUND, RICHARD B. WHEATLEY, TAMBRY T. WHEATLEY,

Respondents and Appellees.

APPELLEE MISSOULA COUNTY'S RESPONSE BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Montana
Cause No. DV-08-1047
Hon. Ed McLean

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I. STATEMENT OF THE ISSUE

Did the District Court correctly conclude as a matter of law that Appellant Phyllis Jamison's (hereinafter "Ms. Jamison") claims should be dismissed in full as to all claims made against all named Defendants for failing to state a claim upon which relief may be granted pursuant to Montana Rule of Civil Procedure 12?

II. STATEMENT OF THE CASE

On July 6, 2009, the Fourth Judicial District Court, Missoula County, Hon. Ed McLean, Presiding, issued its Opinion and Order of Dismissal (Case Register Report ("Dkt.") 23), dismissing all of Ms. Jamison's claims pursuant to Montana Rule of Civil Procedure 12. Ms. Jamison filed her initial complaint on August 19, 2008 (Dkt. 2). Defendant Missoula County filed a Motion to Dismiss; Alternatively, Motion for More Definite Statement on September 22, 2008 (Dkt. 12). Defendants Dena and Jack Lund ("the Lunds") filed a similar Motion (Dkt. 11). Ms. Jamison did not file a response brief to these motions. Rather, on September 29, 2008, Ms. Jamison filed a motion for a 90-day extension of time for the ACLU to process her request for representation and to allow her to file an amended complaint (Dkt. 13). No proposed amended complaint accompanied the request. On December 29, 2008, Ms. Jamison filed a "Final Motion for Extension to January 20, 2009 to File Amended Complaint" (Dkt. 15), stating that the ACLU had not responded to her request and she was considering an amendment to specify

additional claims and to add parties. Again, no proposed amended complaint accompanied the motion.

The District Court did not address Ms. Jamison's request for a 90 day extension, but granted her second request and ordered her to file her Amended Complaint by January 20, 2009, or the Court would rule on the Defendants' motions based on the original pleadings.

On January 20, 2009, Ms. Jamison filed an Amended Complaint (Dkt. 18). The Complaint removed some defendants and added others. No summonses for the newly named defendants have ever been requested or issued; thus, for example, Defendants Richard and Tambry Wheatley (the "Wheatleys") have never been served and have not made an appearance in this matter. On February 12, 2009, Ms. Jamison filed a "Motion to file 'Final Amended Complaint,'" asserting that "groundbreaking law" signed by President Obama gave her standing to file discrimination claims against Missoula County (Dkt. 19). Ms. Jamison alleged that each time the County did not plow and sand her driveway was a separate act of retaliation for her political beliefs which extended the 180 day statute of limitations for such claims. She asked the Court for permission to file a Final Amended Complaint by June 12, 2009. No proposed amended complaint accompanied the Motion. When the Court had not responded to Ms. Jamison's Motion by this date, she filed a "Motion to Lodge" (Dkt. 22), asking the Court for permission to lodge

her Final Amended Complaint with the Court pending the Court's decision on her February 12, 2009, motion.

In its Opinion and Order of Dismissal dated July 6, 2009 (Dkt. 23), the District Court addressed Ms. Jamison's Amended Complaint as well as her motion to file a Final Amended Complaint. The Court dismissed Ms. Jamison's claims in full, noting that her claims against Missoula County constitute an attempt to revive discrimination claims which have long been barred by statutes of limitations. Regarding her motion to file a Final Amended Complaint, the Court noted the federal law Ms. Jamison cited in support of her attempts to revive her discrimination claims applied to wage claims, not discrimination claims. With respect to the Lunds, the District Court noted that Ms. Jamison has no private right to force the Lunds to remove encroachments within a County right-of-way intended to be abandoned.

III. STATEMENT OF FACTS

Ms. Jamison has very strong feelings about cats. Nevertheless, her self-described political beliefs in cats have never had anything to do with Missoula County's decision not to plow, sand, or otherwise maintain the portion of Woodville Avenue in Clinton, Montana which serves as her private driveway. *See* Ex. A. Ms. Jamison's allegations of discrimination date back to events that took place around 2001. Ex. B-2. Ms. Jamison attended a Missoula County

Commissioners' meeting on August 8, 2001 where she expressed her views that Missoula County Animal Control should accept all cats into its shelter and made related statements regarding the need for cat rescue. Ex. B-2.

Unrelated to Ms. Jamison's appearance at the meeting, on the same day, the County sent Ms. Jamison a letter from the County's Director of Public Works, Greg Robertson, informing her that the County would not maintain her driveway which is located partially within the County-owned right-of-way for Woodville Avenue. Ex. B-2; Ex. C. The southern portion of Ms. Jamison's driveway leaves the right-of-way and crosses a portion of the Wheatleys' private property. Ex. A. Until 2001, the County had provided occasional snow plowing and sanding services for portions of her driveway, believing it was part of the County's regularly maintained road system. During the winter of 2000-2001, Ms. Jamison made numerous telephone calls to the County to complain that her driveway had not been plowed as frequently as other portions of Woodville Avenue. Ex. B-5. Ultimately, the County decided to stop all maintenance of the portion of Woodville Avenue south of Third Street in Clinton as well as numerous other similar stretches of County owned rights-of-way throughout Missoula County. Ex. B-10; Ex. C.

The County's August 8, 2001 letter to Ms. Jamison was the culmination of months of research and discussions occurring prior to her appearance at the August 8, 2001 meeting. For example, Greg Robertson advised Ms. Jamison in a letter

dated March 9, 2001 that he was continuing to research the status of her portion of Woodville Avenue and would report to her and the County Commissioners soon.

Ex. D. On July 26, 2001, County Surveyor Horace Brown wrote a memo to Greg Robertson explaining his opinion regarding Ms. Jamison's portion of Woodville Avenue. Ex. E. He stated that this portion of the road had never officially been maintained by the County Road Department. Ex. E. He also stated that the County allowed the driveway to be constructed within the Woodville Avenue right-of-way for access to the adjacent properties, but the Road Department had never accepted it for maintenance. Ex. E.

On July 30, 2001, Greg Robertson provided a memorandum to the County Commissioners outlining his findings. Ex. F. He noted that the portion of Woodville Avenue serving Ms. Jamison's property functions as a private driveway serving one residence. Ex. F. Because the driveway is only twelve feet in width with no cul-de-sac for vehicular turn around, Mr. Robertson concluded it was unsafe for his Public Works Department employees to maneuver within. Ex. F. He found no evidence the Road Department had ever regularly maintained this portion of Woodville Avenue and recommended that Missoula County continue to recognize it as a private driveway and not accept it for maintenance. Ex. F. On the basis of these findings, which were authored prior to Ms. Jamison's appearance at the August 8, 2001 Commissioners' meeting, Mr. Robertson sent Ms. Jamison a

letter explaining the County's decision. Ex. C. As noted, that letter was dated August 8, 2001 and was co-signed by the three County Commissioners. Ex. C.

Years later, Ms. Jamison turned her attention to encroachments located within the Woodville Avenue right-of-way. Ex. B-22. By letter dated September 12, 2006, Ms. Jamison asked the County to address three encroachments, including an old shed, a fence and a gate. She also asked the County to remove eight mature trees growing in the right-of-way. The Lunds owned the shed and the fence. In light of these concerns, Mr. Robertson had the right-of-way staked to determine the extent of the encroachments and whether they presented any particular concern to the County. Ex. G. He documented his findings in a letter to the County Commissioners dated September 25, 2006, concluding there was no public interest in removing the encroachments. Ex. G. Further, he concluded the encroachments were not preventing Ms. Jamison from accomplishing her goal to relocate her driveway to be entirely within the right-of-way and off the Wheatleys' property. Ex. G. In a letter dated the same day, Mr. Robertson informed Ms. Jamison that he agreed to help her develop a plan for relocating her driveway. Ex. H. The County provided this plan to Ms. Jamison on March 23, 2007. *See Appellant's Opening Br.*, Ex.10 (Apr. 30, 2010).

Around this same time, the Lunds' septic system failed and the Missoula City/County Environmental Health Department issued a permit on September 25,

2006, for a replacement system in the same location as the old one. After the Lunds replaced the septic drainfield, the Environmental Health Department realized the drainfield was located within the County right-of-way for Woodville Avenue and advised the Lunds they would need to obtain an easement from the County, have the County abandon the portion of the right-of-way on which the drainfield was located, or install a new system entirely on the Lunds' property. *See* Br. Support Def. Lunds' Mot. Dismiss Pl.'s Amend. Compl. 4 (May 8, 2009) (Dkt. 21). The Lunds asked the County to abandon the small portion of the Woodville Avenue right-of-way on which the drainfield was located. Like many old townsites throughout Montana, some streets are constructed, some are not, and there are numerous encroachments of dwellings, sheds, fences and other structures in the County's rights-of-way.

Woodville Avenue south of Third Street provides access only to property owned by Ms. Jamison, the Lunds and the Wheatleys, though only Ms. Jamison uses the right-of-way for any sort of regular vehicular access. *See* Ex. A. The County surveyed the right-of-way to determine the extent of the encroachments and to also determine an appropriate location and plan for Ms. Jamison's driveway. *See* Appellant's Opening Br., Ex. 10. On March 21, 2007, Ms. Jamison sent the County a 57-page correspondence addressing the encroachments and other issues related to the County's lack of maintenance and oversight for this portion of

Woodville Avenue. Ex. B-5. In this correspondence, Ms. Jamison threatened to file a discrimination complaint against the County if it did not meet Ms. Jamison's demands regarding the encroachments. Ex. B-5.

In light of Ms. Jamison's correspondence, the ongoing tension between the neighbors regarding the encroachments and the Lunds' abandonment request, the County sought to negotiate a solution. On April 13, 2007, Deputy County Attorney James McCubbin, County Surveyor Charles Wright, the Lunds, the Wheatleys and Ms. Jamison met at Woodville Avenue to discuss the Lunds' request to abandon a portion of Woodville Avenue and Ms. Jamison's encroachment concerns. Ex. B-9, 11. The Lunds and the Wheatleys consented to the abandonment request. Ms. Jamison requested certain conditions before she would grant her consent. Ms. Jamison insisted the Lunds remove the old shed and a fence located in the right-of-way. She also insisted the Lunds pay for removing three large ponderosa pine trees located in Woodville Avenue south of the Lunds' property. Upon fulfillment of these conditions, Ms. Jamison agreed to consent to the partial abandonment of Woodville Avenue or, alternatively, waive any further consent that would otherwise be required for the road abandonment. The Lunds agreed to these conditions and Mr. McCubbin wrote the agreement out by hand while the parties waited. Ex. I. After reviewing the handwritten agreement, Ms. Jamison requested several changes. The parties agreed to the changes which were

incorporated into the agreement and initialed. The parties then signed the agreement and Mr. Wright notarized it. Ex. I.

The Lunds promptly proceeded to perform the terms of the agreement. They removed the shed. They moved the fence and placed it on the line that would become the new property line once the partial right-of-way abandonment was complete. They paid to have the three Ponderosa trees removed from the right-of-way. Dkt. 21 at 5. They presented a Petition to Abandon County Road, Street, or Alley, dated July 15, 2007, to the Commissioners pursuant to Montana Code Annotated §§ 7-14-2601–2615. Ex. J. The area proposed for abandonment is shown on page 5 of Exhibit J.

Sometime in May, after the trees were removed, Ms. Jamison planted a new pine tree near the right-of-way. The Lunds informed the County that the tree appeared to be planted within the right-of-way and asked the County to have it removed as an encroachment. Based upon a photograph provided by the Lunds which showed the tree was potentially encroaching, the County prepared an encroachment notice on May 29, 2007, ordering the tree to be removed. On May 30, 2007, Steve Niday, the County's Survey Party Chief at the time, drove out to Woodville Avenue to inspect the tree and serve the encroachment notice. Ex. B-10.

When Mr. Niday arrived, he witnessed Ms. Jamison watering the tree and inspected its location. He determined the tree was not located within the right-of-way and was, therefore, not encroaching. Mr. Niday informed Ms. Jamison that the encroachment notice was not valid and decided not to post the notice or give Ms. Jamison a copy. Ms. Jamison pleaded with Mr. Niday to give her a copy of the notice because she believed it was evidence of wrongdoing by the County. At one point, she became so agitated that she jumped on Mr. Niday's back and attempted to physically wrestle the notice from him. After much further discussion, Mr. Niday agreed to give Ms. Jamison the notice, but wrote a note on it indicating that the tree was not encroaching. Ex. B-10-11.

As threatened in her March 21, 2007 correspondence to the County, Ms. Jamison filed a Complaint of Discrimination with the Montana Human Rights Bureau on August 30, 2007. She named as defendants, Missoula County, the County Commissioners, each Commissioner individually, two deputy county attorneys, three employees of the Public Works Department, two employees of the Missoula City-County Environmental Health Department, and the supervisor of the Animal Control Shelter. Following an investigation, the Human Rights Bureau issued a report dated February 20, 2008, and Notice of Dismissal and Notice of Right to File Civil Action in District Court, dated February 21, 2008, finding Ms. Jamison's allegations of discrimination were not supported by a preponderance of

the evidence and issued a finding of no reasonable cause to believe any unlawful discrimination occurred. Ex. B. The Bureau determined that most of Ms. Jamison's complaints were well outside the 180-day statute of limitations for filing a claim, given that the events occurred in 2001 and the discrimination complaint was filed in 2007. Ex. B-16-23. Ms. Jamison filed an objection to the Notice of Dismissal, but the Human Rights Commission affirmed by Order dated May 16, 2008.

Meanwhile, the County scheduled a public hearing for September 19, 2007 to consider abandoning the agreed-upon portion of Woodville Avenue. The County held the hearing despite Ms. Jamison's protests that the hearing should be delayed until after the Human Right Bureau issued its decision. Ms. Jamison spoke at the hearing, as did the Lunds and several others. The County announced at the end of the hearing that it would delay further proceedings on the matter until a meeting to be held on October 10, 2007. At the October 10, 2007 meeting, the County postponed further consideration until after the Human Rights Bureau issued its decision. After the Human Rights Bureau found in the County's favor, the County rescheduled its consideration of the abandonment of the agreed-upon portion of Woodville Ave, but again postponed it when Ms. Jamison filed her Complaint in District Court. Ex. K.

Ms. Jamison filed her initial Complaint on August 19, 2008. She filed her Amended Complaint on January 20, 2009. Her request to file a second amended complaint was denied by the District Court by virtue of its July 6, 2009 Opinion and Order of Dismissal. Ms. Jamison filed her notice of appeal on November 9, 2009.

The County recognizes that a District Court's decision to dismiss an action pursuant to Montana Rule of Civil Procedure 12(b)(6) is limited to an examination of the well-plead allegations in the Complaint. The County provides the above factual summary for background information so the Court is aware of how the matter got to this point and to address the statements made in Ms. Jamison's Opening Brief.

IV. STANDARD OF REVIEW

The District Court's determination that a complaint fails to state a claim upon which relief can be granted is a conclusion of law which this Court reviews to determine whether the District Court's interpretation of the law is correct. *Sikorski v. Johnson*, 2006 MT 228, ¶ 8, 333 Mont. 434, 143 P.3d 161 (citing *Dukes v. Sirius Constr., Inc.*, 2003 MT 152, ¶ 11, 316 Mont. 226, 73 P.3d 781).

V. SUMMARY OF ARGUMENT

Ms. Jamison wants Missoula County to maintain her driveway. She believes the reason Missoula County is not maintaining her driveway is because the County

discriminates against her on the basis of her political beliefs in cats. The Montana Human Rights Bureau found no reasonable cause in any of Ms. Jamison's claims to believe the County has discriminated against her. In her Complaint, Ms. Jamison specifically acknowledges that she does not ask the Court to review the decision of the Human Rights Bureau, but is proceeding on other grounds. Ultimately, Ms. Jamison wants the Court to order the County to maintain her road and construct improvements to her driveway and to order the Lunds to remove their encroachments from the right-of-way. The District Court correctly concluded there is no set of facts which would entitle Ms. Jamison to such relief and correctly dismissed all claims against all parties.

VI. ARGUMENT

Ms. Jamison's Amended Complaint is difficult to decipher because it is presented in narrative form and blends arguments with allegations. Ultimately, one must look to Ms. Jamison's prayer for relief in order to understand the purpose behind the Complaint. Ms. Jamison seeks to have certain encroachments removed from Woodville Avenue and to have the County maintain her driveway.

In her Opening Brief, Ms. Jamison presents four issues for review, none of which directly addresses whether the District Court correctly dismissed her Amended Complaint for failing to state a viable cause of action. Rather, they address the merits of Ms. Jamison's claims as well as claims not presented in her

Amended Complaint. In Issue 1, Ms. Jamison argues the District Court's Order denied her all pedestrian and vehicular access as well as her only fire escape route. The Order did no such thing. Ms. Jamison has existing access to her property via a County-owned, but not maintained, right-of-way. The portion of the right-of-way proposed for abandonment is not used or needed by Ms. Jamison. While the Order dismissed her claims, it did nothing to affect the status of the right-of-way serving Ms. Jamison's property.

In Issue 2, Ms. Jamison argues Missoula County took many months to draft a contract with her neighbors while excluding her participation and ultimately coercing her to sign the contract without adequate time to review it. However, Ms. Jamison makes no allegations in her Complaint that the contract had been prepared over many months, or that she was excluded from participating in drafting the contract. In fact, Ms. Jamison acknowledges that the agreement was written following the parties' on-site discussions regarding the encroachments and proposed partial abandonment. *See Appellant's Opening Br. 8.*

In Issue 3, Ms. Jamison asks the Court to determine whether the District Court's September 9, 2009 Judgment "encourages the decades-long culture of Missoula County's negligence in allowing significant encroachments, county-wide, onto its rights of way, . . ." Appellant's Opening Br. 2. No such cause of action

appears in Ms. Jamison's Amended Complaint nor is the theoretical effect of a Judgment on the County's general conduct a proper issue for appeal.

Issue 4 appears to be a revival of Ms. Jamison's discrimination claims pertaining to the County's decision to not maintain her driveway and her political beliefs in cats. However, Ms. Jamison specifically states in her Amended Complaint that she is not asking the District Court to review the Human Rights Bureau's decision. Further, no such claim appears in her Amended Complaint.

Beginning on page 9 of Ms. Jamison's Opening Brief, she lists the relief she seeks, the majority of which is well outside the scope of this appeal. The only issue properly before this Court is whether the District Court correctly concluded as a matter of law that Ms. Jamison's Amended Complaint fails to state a claim upon which relief may be granted. The only appropriate relief would be the restitution of her claims which could proceed to a determination on the merits. Regardless, the District Court reached the correct conclusion and should be affirmed.

A. The District Court Correctly Concluded That Ms. Jamison's Amended Complaint Failed to State a Viable Cause of Action Under Any Set of Facts As a Matter of Law and Must Be Dismissed.

Ms. Jamison correctly notes that the District Court's Opinion and Order of Dismissal contains a factual error. The Missoula County Commissioners have not yet taken a vote on whether to abandon the agreed-upon portion of Woodville

Avenue. The Commissioners were prepared to take this final step, but chose to delay action after Ms. Jamison filed this action. Nevertheless, the District Court correctly concluded that all claims should be dismissed for failing to state a viable cause of action. If this Court reaches the same conclusion as the District Court, but on different grounds, the Court may nonetheless affirm the District Court's judgment. *Germann v. Stephens*, 2006 MT 130, ¶ 21, 332 Mont. 303, 137 P.3d 545 (citing *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶ 25, 303 Mont. 519, 16 P.3d 399).

A claim may be dismissed for failing to state a claim upon which relief can be granted only if it appears beyond a doubt that a plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. *Sikorski*, ¶ 11. While a Rule 12(b)(6) motion to dismiss has the effect of admitting all well-pled allegations in the complaint, it is difficult to determine what allegations Ms. Jamison makes and what claims she is asserting. *Sikorski*, ¶ 11.

At the very least, Ms. Jamison's prayer for relief in her Amended Complaint gives a better sense of the purpose behind the Complaint and allows a determination of whether such relief is even possible. The entire prayer for relief is as follows:

Jamison requests the court to permanently restore her road maintenance certificate and to permanently replace her road onto the official county road maintenance inventory and to plow and sand and otherwise maintain Woodville Avenue south of Third

Street, that serves her home, each and every time that the county plows and sands and otherwise maintains the nearby roads for all of Jamison's neighbors.

I pray the district court to order the Lunds to remove all of their encroachments, including all of their encroaching fences, signs, buildings and septic system – which have all been constructed entirely in the middle of Woodville Avenue and I pray the district court will place a permanent injunction against Missoula County and against the Lunds and the Wheatleys to insure that no more encroachments, of any kind whatsoever, are ever allowed on or in the Woodville Ave right-of-way. I pray the only fence the Lunds will ever be permitted to build will be on their current property line which, on the Woodville Ave. side, is no more than four feet from the side of their house. The Lunds already have abandonments on two sides of their house: a thirty foot wide abandonment on the 3rd Street side and a four foot abandonment on the Woodville side.

Alternatively, I pray the court will allow only the Lund's encroaching septic system to be abandoned and that any fence be constructed on the Lund's existing property line or only over the septic itself, with the stipulation that if the Lund's ever encroach again, their septic will have to be removed and the abandonment voided.

I pray that the county remove all trees in the Woodville Avenue easement because Deputy Fire Marshall told me that when there is not adequate turnaround space at a dead end, that the fire personnel may enter an area anyway "if it looks good to them." It won't look good to them with less than a twenty foot wide access and also with numerous pine trees and wood sheds in the middle of the street – especially if those trees and structures in the middle of Woodville are burning. Many of these trees in the middle of the road are ones that McCubbin did not include in the abandonment agreement, even though they are marked on the top maps as needing to be removed.

I pray the county either remove or post encroachment notices to the Lunds and to the Wheatleys to remove all of their trees and

fences that are encroaching onto Woodville Avenue.

I pray the court order the county to erect steel and concrete barriers and reflectors at the dead end of Woodville where it drops off without even any signs being posted that it is a thirty foot vehicle drop off. It is only a matter of time until someone gets killed driving off that cliff or slipping off in bad weather. Perhaps the Federal funds that have been set aside recently for dangerous roads could be used, but the county needs to take care of this extreme hazard quickly.

I pray the county to build the retaining wall that it shows is necessary in order for me to even have a fifteen foot wide access to Woodville Avenue.

Amend. Compl. 11-13 (Jan. 20, 2009) (Dkt. 18).

Essentially, Ms. Jamison's prayer for relief seeks four things: 1) an order requiring the County to maintain her driveway; 2) an order requiring the removal of all trees, fences, and the Lunds' shed and septic system from Woodville Avenue; 3) a permanent injunction against the County, the Lunds and the Wheatleys prohibiting future encroachments; and 4) an order requiring the County to erect steel and concrete barriers and reflectors at the end of Woodville Avenue along with a retaining wall.

There are numerous problems with Ms. Jamison's prayer for relief which demonstrate why the District Court correctly dismissed all claims. First, Ms. Jamison has never followed the procedures set forth in Montana Code Annotated Title 27, Chapter 19 for obtaining injunctive relief. Second, Ms. Jamison's Amended Complaint contains no allegations explaining why the County is

obligated to construct barriers, reflectors or a retaining wall in Woodville Avenue.

Regarding the maintenance and encroachment issues, Ms. Jamison cites to no law, authority, or duty supporting her assertion that the County must maintain her driveway or remove encroachments in Woodville Avenue. The portion of Woodville Avenue which serves as Ms. Jamison's driveway has never been constructed or operated as a County road. It has served solely as private access within a County-owned right-of-way.

Ms. Jamison would be unable to set forth any set of facts which would establish an obligation or requirement for the County to "plow and sand and otherwise" maintain Woodville Avenue. The level of maintenance of any particular County road is a purely discretionary decision by the County pursuant to Montana Code Annotated § 7-14-2103(4) which states the general duties of County Commissioners concerning county roads.

Duties of county commissioners concerning county roads. (1)

A board of county commissioners has general supervision over the county roads within the county.

(2) A board may survey, view, lay out, record, open, work, and maintain county roads that are established in accordance with this chapter. Guideposts must be erected.

(3) A board may discontinue or abandon county roads when freeholders properly petition for discontinuance or abandonment.

(4) A board of county commissioners may determine the level and scope of maintenance on a county road under its jurisdiction, and a local entity or the state may not withhold funds based on the board's maintenance determinations.

Mont. Code Ann. § 7-14-2103(1)-(4) (2009). This statute establishes that the level

of maintenance directed to any particular county road is purely a matter of discretion for the County Commissioners. As a purely discretionary act, Ms. Jamison has no cause of action to enforce the County's decision to cease maintenance of the portion of Woodville Avenue which serves as her driveway.

Thus, even taking as true all the well-pled allegations in Ms. Jamison's Amended Complaint, the District Court cannot grant the relief requested. Two of the items of relief sought do not match any of the allegations or causes of action (injunctive relief and the construction of barriers, reflectors and a retaining wall). The other two items of relief sought fail because Ms. Jamison has failed to cite to any statute, regulation, or other authority requiring the County to maintain her driveway or otherwise remove encroachments in a County right-of-way that has never been constructed as a County road.

Finally, in her February 12, 2009, Motion to File Final Amended Complaint (Dkt. 19), Ms. Jamison cites to a newspaper article regarding the federal Lilly Ledbetter Fair Pay Act as support for filing a second amended complaint. Ms. Jamison argued this new federal legislation extended the statute of limitations which has long run out on her discrimination claims. However, as the District Court pointed out, the Lilly Ledbetter Fair Pay Act pertains to wage discrimination claims, not claims based on political ideology such as Ms. Jamison's. *See* Pub. L. No. 111-2, 123 Stat. 5 (2009). Therefore, the District Court correctly declined to

grant Ms. Jamison's Motion to File Final Amended Complaint.



VII. CONCLUSION

The District Court may not grant any of the relief requested by Ms. Jamison in her Amended Complaint. Her Amended Complaint fails to establish any statute, regulation, or other authority or basis which would entitle her to have the County maintain or improve a County right-of-way which has never been constructed as a County road and serves as a private driveway. While Ms. Jamison may seek to obtain permits from the County to allow her to conduct certain work within the right-of-way, there is no cause of action or set of facts which will entitle her to the relief she seeks. Therefore, the District Court correctly concluded Ms. Jamison's Amended Complaint should be dismissed for failing to state a viable cause of action upon which relief may be granted.

DATED this 4th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is not more than 10,000 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 4th day of June, 2010.



Alan F. McCormick by 

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I hereby certify that I served true and accurate copies of the foregoing
Appellee Missoula County's Response Brief by depositing said copies into the U.S.
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